

# Protecting One of Your Most Valuable Assets – Your Employees

By Howard E. Bogard

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Several studies show that the total cost of losing an employee can range from tens of thousands of dollars to 150 percent of the employee's annual salary. There are also the "soft costs" of losing an employee, including lost productivity and lower employee morale if the practice incurs high turnover rates. According to a survey by the Medical Group Management Association, 50 percent of respondents reported that clinical support staff positions, such as nurses and clinical assistants, had the most turnover. When these employees leave a medical practice, they may also take with them valuable, confidential information, including patient lists, fee schedules and vendor contracts.

From a legal (and practical) standpoint, it is very difficult to prevent an employee from leaving a medical practice, but you can implement several strategies to limit the adverse impact.

First, for certain "high-level" employees, the practice can require each employee to sign a non-compete agreement. A typical non-compete agreement would prevent the departing employee from working in a competing business for a certain period of time within a designated area. For a non-compete to be enforceable in Alabama it must be reasonable as to geographic scope (*e.g.*, the service area of the medical practice) and as to duration (*e.g.*, up to two years is presumed reasonable). Further, the non-compete must serve to protect the practice's "protectable interests," which includes the practice's confidential information (*e.g.*, pricing and patient lists and vendor information) and specialized training provided by the practice to its employees. A non-compete should only be used for employees that hold a position "uniquely essential" to the management, organization or service of the practice. Accordingly, a properly drafted non-compete for an administrator or other high-level employees should be enforceable, but a non-compete should not be used, for example, with a receptionist. Further, in Alabama non-compete agreements cannot be used with professionals, which have been defined by the courts to include physicians and physical therapists. Other clinicians that exercise independent, clinical judgment may also fall within this "professional exemption."

Second, each employee (or at least the physicians and other "high-level" employees) of the practice can be asked to sign a non-solicitation agreement restricting the employee from "hiring away" other practice employees upon their departure. Non-solicitation agreements are common in physician employment agreements, but can also be used for other employees. A typical non-solicitation provision would read: "Employee agrees that, during the term of his/her employment with the Medical Practice and for a period of one year following termination of employment, regardless of the cause of such termination, Employee shall not, directly or indirectly, through any individual, person or entity, without the prior written consent of the Medical Practice: (a) solicit, induce or attempt to solicit or induce away, or aid, assist or abet any other party or person in soliciting, inducing or attempting to solicit or induce away any employee of the Medical Practice,

or (b) employ, hire or contract for services with any employee of the Medical Practice, or any person who was an employee of the Medical Practice during the six (6) month period immediately prior to termination of the Employee's employment with the Medical Practice."

The final option to consider is a confidentiality agreement with employees. This type of agreement prevents a departing employee from retaining or using any of the practice's confidential information after leaving the practice. Confidential information can be defined broadly to mean any sensitive or proprietary information of the practice, including all business or management studies, patient lists and records, financial information, trade secrets, fee schedules, and employee and operating manuals. A strong confidentiality agreement will become especially important if an employee leaves a medical practice to work for a competitor.

**For more information, please contact:**



[Howard E. Bogard](#)  
Partner, Birmingham  
P. (205) 458-5416  
E. [hbogard@burr.com](mailto:hbogard@burr.com)

*Howard Bogard is an attorney with Burr & Forman LLP and is the Chair of the firm's Health Care Industry Group and the firm's Chief HIPAA Compliance Officer.*